No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

The pleadings disclose this to be an action brought by the appellee against the appellant under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S. C.A. App. Supp. III, Sec. 901 et seq.), as amended by the Stabilization Extension Act of 1944. (58 Stat. 636.) Judgment for injunction and recovery of treble damages in the sum of $17,656.11 was asked. The appeal is taken from a final judgment of the District Court granting a permanent injunction and awarding damages against appellant in the sum of $4,469.29.

Jurisdiction of the District Court was invoked under Sections 205 (c) and 205 (e) of the Act as indicated in the amended complaint. (Tr. pp. 2-5.) Jurisdiction of this Court is invoked under Section 128 of the Judicial Code. (28 U.S.C.A. Sec. 225.)

STATUTES AND REGULATIONS INVOLVED.

The action involves the Emergency Price Control Act of 1942, as amended, Maximum Price Regulation 133 (7 F.R. 3185), as amended, and Maximum Price Regulation 136 (7 F.R. 3198), as amended, both issued under the Act and hereinafter called MPR 133 and MPR 136.

The pertinent sections of the Act as amended are as follows: Section 205 (e) creates a right of action in the Price Administrator to recover damages not greater than three times the overcharges in excess of the maximum price provided in a regulation issued under the Act charged by a seller to a purchaser who buys for use or consumption "in the course of trade or business." Recovery is limited to the amount of the actual overcharges if the seller proves the violation to be neither wilful nor the result of failure to take practicable precautions against the occurrence thereof. Section 205 (a) of the Act provides for the granting of injunctions against practices constituting violations of the Act.

MPR 136, Section 1390.2 (f), provided for the exclusion from the effect of the order of retail sales.

Section 1390.11 of that order set ceiling prices on sales of used machinery which was guaranteed in writing and so invoiced at 85% of the price of nearest equivalent new machine.

MPR 133, Section 1361.3a contained similar provisions except that the guarantee was required to be written on a prescribed form specified in the order and delivered to the purchaser.

STATEMENT OF CASE AND PROBLEMS INVOLVED.

The amended complaint alleges sales by defendant of used farm tractors, both crawler and wheel types, after August 1, 1943, at prices in excess of MPR 133 as to the wheel tractors, and in excess of MPR 136 as to the crawler tractors.

Defendant's amended answer denied the making of overcharges and alleged as separate defenses that it was entitled to charge the guaranteed prices provided in the orders by reason of oral guarantees given the purchasers, that the sales of the crawler tractors were excluded from MPR 136 as retail sales, and that it took all practicable precautions against the commission of violations which, if any occurred, were not wilful.

It was stipulated that all of the sales of crawler tractors, except one, were made to farmers for agricultural use on their farms or ranches. The exception was a sale for use in lumbering operations.

All of the tractors were orally guaranteed against defects for a period of at least 60 days. Written guarantees were also given on several sales. Defendant reconditioned the tractors sold and fulfilled its oral guarantees by the making of repairs when requested without charge to the purchasers.

The sales took place over a period from August 20, 1943, to October 25, 1943. On July 10, 1943, the San Francisco District Office of plaintiff advised defendant and other farm equipment dealers by form letter that sales of used crawler tractors to farmers were retail sales and, as such, were excluded from MPR 136 and were subject to the General Maximum Price Regulation.

The District Court concluded that MPR 136 applied to the sales of used crawler tractors to farmers, found that neither the oral guarantees nor the written guarantees given by defendant to the farmers entitled defendant to charge the guaranteed prices provided in the regulations and found that defendant's violations were neither wilful nor the result of a failure to take practicable precautions against the occurrence of violations. Judgment for an injunction and for the actual overcharges found was rendered.

The main questions on this appeal are whether MPR 136 applies to the sales of crawler tractors to farmers and whether, if it did, defendant was not entitled to charge the guaranteed price (85% of the base price) on the sales guaranteed in writing rather than the unguaranteed price (55% of the base price).

SPECIFICATION OF ERRORS.

1. The District Court erred in concluding as a matter of law that MPR 136 applied to sales of crawler tractors to farmers. (See Conclusion of Law 1, Tr. p. 21.)

2. The District Court erred in finding as a fact that the tractors sold to Teresi and Badami were not entitled to a reconditioned and guaranteed price, if MPR 136 applied. (See Fact Findings 10 and 13, Tr. pp. 19, 20.)

3. The District Court erred in concluding as a matter of law that plaintiff was entitled to an injunction against defendant.

4. The District Court erred in awarding plaintiff damages under MPR 136 on the sales to farmers.

5. The District Court erred in awarding an injunction against appellant as to MPR 136.

SUMMARY OF APPELLANT'S ARGUMENT.

First: Farming while it is a "trade or business" under the Act, entitling the Administrator to sue, is not an "industrial, commercial or governmental" trade or business. Therefore the sales by defendant to farmers were sales "at retail" as defined and expressly excluded from the operation of MPR 136 and that order furnishes plaintiff no ground of action on such sales.

The plaintiff specifically so construed that order and so advised defendant and the retail farm equipment trade shortly before the sales involved in this case were made.

Second: If our first point be decided adversely, the sales of crawler tractors to Thos. D. Teresi and T. J. Badami were at prices under the ceilings provided in MPR 136 since each sale was of a reconditioned tractor, guaranteed in writing and so invoiced.

Damages in the total sum of $1,485.46 on those two sales were improperly assessed against defendant.

ARGUMENT.

I.

THE SALES OF CRAWLER TRACTORS TO FARMERS WERE RETAIL SALES EXPRESSLY EXCLUDED FROM THE OPERATION OF MPR 136.

(a) The words "industrial" and "commercial" are mutually exclusive and neither includes farming.

All of the sales of tractors in this case were made to farmers for use on their farms with the exception of the tractor sold to H. R. Van Horn, which was for use in lumbering. (Stipulation of Counsel, Tr. pp. 11-12.)

At the time of the sales in this case MPR 136, Section 1390.2 provided as follows:

> "This regulation shall not apply to:
> (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof. For the purpose of this exclusion a sale

> or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user, or (2) * * *''

Under this exclusion a purchase by a farmer for use in farming is a purchase for agricultural use and not for industrial or commercial use upon the proper construction of the quoted clause and in accordance with accepted legal principles. Farming is a "trade or business" but is not an "industrial or commercial" trade or business.

That the San Francisco District Office of plaintiff so construed the language appears clearly in the "Questions and Answers" mailed by the plaintiff to defendant and other members of the trade (Dft's. Ex. H., Tr. pp. 58-71) and received by defendant on July 10, 1943 (Tr. p. 71), shortly before the first of the sales involved in this case. Plaintiff's District Office informed defendant and the trade on three occasions in this communication that the General Maximum Price Regulation, not MPR 136, applied to sales of crawler tractors to farmers. Section 31 thereof (Tr. pp. 68-69) reads as follows:

> "(31) Sales of Used Crawler Tractors
>
> Q. What regulation covers the sales of used crawler tractors to farmers by dealers?
>
> A. A sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and be excluded from Maximum Price Regulation 136 and is placed under the General Maximum Price Regulation."

See also Section 11 (Tr. p. 63) so advising on the sale of new crawler tractors and Section 40 (Tr. p. 71) to the same effect on farmer to farmer sales of crawler tractors.

That the San Francisco District Office was not the only office of plaintiff so construing MPR 136 appears clearly in the testimony of Austin Clapp, who was, in 1943, Chief of Industrial Manufacturing Branch of the Enforcement Division in plaintiff's national office. (Tr. p. 84.) He testified that shortly after January 9, 1943, some of plaintiff's offices "jumped hastily" to the conclusion that a sale of a crawler tractor to a farmer was a sale at retail and "did issue at one time interpretations to the same effect as this." (Tr. p. 86.)

Not until September 1, 1943, did plaintiff take any action to indicate it differed with these interpretations issued by its District Offices. On that day it apparently issued an interpretation to the contrary. This "interpretation" is found in 8 Op. & Dec. p. 40: 20-24. No notice of this change of position on the part of plaintiff was sent to defendant. (Tr. p. 57.)

Under such circumstances, were it not for plaintiff's governmental character, a clear case for the application of the doctrine of estoppel would be present, even if plaintiff's change of position of September 1, 1943, was correct.

But plaintiff's subsequent "interpretation" of September 1, 1943, is not correct. The District Offices of plaintiff, in advising the trade as they did on this

point construed MPR 136 in strict accordance with accepted legal principles and decisions uniformly supporting their construction of such language.

While this Court followed the September 1, 1943 interpretation in the case of *Bowles v. Trullinger,* 152 F. (2d) 191 (Dec. 5, 1945), decided after this appeal was taken, the correctness of that interpretation was seemingly accepted without question or argument. We respectfully submit that the *Trullinger* case, insofar as it approves of the September 1, 1943 interpretation, stands alone and is in direct opposition to all previous decisions construing the meaning of such language.

In *Terrace v. Thompson,* 263 U.S. 177, 44 S. Ct. 15, 68 L. Ed. 255, a state statute prohibited the leasing of land to Japanese aliens for agricultural purposes. To the contention that the statute was in conflict with the treaty with Japan permitting Japanese to lease land "for residential and commercial purposes," the United States Supreme Court said,

> "The right * * * 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade' cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes.*" (Italics ours.)

In *U. S. v. Public Service Co.,* 143 F. (2d) 79, it was held that a tax on electrical energy sold "for domestic or commercial consumption and not for re-

sale'' had no application to electricity sold to dairies to use in the pasteurization of milk, since such activity was a processing or industrial operation rather than commercial in character. The Court said,

> ''The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. * * * Aside from the regulation, however, the electrical energy is exempt. It was not sold for commercial consumption within the meaning of the act. All industry in a sense is commercial, but admittedly industrial consumption is not included.''

In *State v. Smith,* 115 SW (2d) 513 (Missouri Supreme Court 1938), a tax was imposed on sales of electricity ''to domestic, commercial or industrial consumers.'' It was held that sales of electricity to a public service company to propel its streetcars and to a municipality for pumping water were not within the taxing clause. To the contention that the language was broad and all inclusive, the Supreme Court of Missouri said,

> ''If 'commercial' is used in its broad sense, it included also the word 'industrial'. * * * If the word 'commercial' includes 'industrial', then why did the Legislature use the word 'industrial' also? We have already seen that every word should be given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the

> intention of including the word 'industrial'. Both were used in the act, not in a broad sense, but, rather, in a restricted sense."

The decisions cited clearly hold that the proper construction of the phrase in question should be narrow and restricted. Under such a construction agricultural use is neither commercial nor industrial.

In *State v. Smith,* supra, the terms were defined as follows:

> "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business which employs much labor and capital and is a distinct branch of trade; as, the sugar industry. Thus we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial'."

Marks Co. v. United States, 12 Ct. Customs App. 110, presented the question whether semi-refined sugar coming from Canada but grown in Cuba was "a product of the soil or industry of the Republic of Cuba imported into the United States" so as to be entitled to a reduction in duty. The Court held that the word "industry" had a limited application distinguishing it from "agricultural" and defined the term to mean "the mechanical and manufacturing activities as distinguished from the agricultural."

See also *In re Yakima Fruit Growers,* 146 P. (2d) 800 (Supreme Court of Washington), holding that

packing house employees were not agricultural laborers, wherein the Court said,

> "Industrial activity commonly means the treatment or processing of raw products in factories."

(b) MPR 136 shows on its face that the principles above set forth were intended to govern its coverage.

It is apparently the contention of the plaintiff that the words "industrial, commercial or governmental" have a meaning synonymous with "trade or business", and that both "industrial" and "commercial" should be construed in their broad sense as though each meant the same thing and included the other. If this is so, we may ask why, by Amendment 96 to MPR 136, issued July 29, 1943 (8 F.R. 10662) Section 1390.2 (f) the exclusionary clause was changed to read:

> "(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, except that the sale or delivery at retail of automotive trucks, trailers and buses (as described in Section 1390.33 (c)) shall not be excluded from but shall be covered by this regulation. * * * For the purposes of this exclusion a sale or delivery is deemed to be at retail * * *"

Section 1390.33 (c), added as new items by said amendment

> "New automotive trucks, trailers, and buses, originally designed for use as private or commercial motor vehicles, which are manufactured on or after August 12, 1943, when sold by any person. * * *"

We find it hard to conceive of the use of trucks or buses not made in the course of trade or business.

Plaintiff, apparently, must have deemed such use in trade or business to be possible and yet not covered by MPR 136, else why the express exception of those vehicles from the exclusion? Could it be that the use designed to be included was use of trucks in agricultural operations such as this case or buses for transportation of passengers in commerce such as was involved in the case of *State v. Smith,* supra. We think the inference as to plaintiff's intent is clear. It should also be noted that this amendment evidencing such construction appeared about the same time as the form letter sent to defendant and just before the sales in this case were made.

We also ask—why, if plaintiff knew in January of 1943 from the reports of "hundreds of violations" testified to by its Chief of the Industrial Manufacturing Branch of the Enforcement Division in Washington (Test. of Austin Clapp, Tr. p. 84), it did not amend its order with respect to crawler tractors as it did for trucks, trailers and buses. Instead a letter in exact accordance with defendant's contentions herein was sent by plaintiff to defendant in July, 1943, by the San Francisco District Office and similar "interpretations" went out to dealers from other District Offices. Yet plaintiff's only attempt to indicate a contrary intent is an "interpretation" dated September 1, 1943, and later published in a reporting service never heard of by the dealers who were shortly to be charged with its violation.

The decision of this Court in *Bowles v. Trullinger,* 152 F. (2d) 191, followed that September 1, 1943, "interpretation" without mention of the contrary

cases and impelling reasons for a contrary conclusion set forth herein. We do not differ with the *Trullinger* case holding that a sale to a farmer is for use in trade or business under the Act but we do differ with its holding based on the September 1, 1943, interpretation that farming is a commercial or industrial trade or business under MPR 136. The *Trullinger* case does not constitute a rule of property. It is erroneous. *Stare decisis* does not require that it remain uncorrected if the Court is convinced of its injustice. The language of the Supreme Court in *Helvering v. Hallock,* 309 U.S. 106, 118, is particularly appropriate under such circumstances. There the Court said:

> "But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience * * *. Surely we are not bound by reason or the considerations that underlie stare decisis to persevere in distinctions taken on the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with the Court's own conception of it."

II.

APPELLANT WAS ENTITLED TO THE GUARANTEED PRICE ON THE SALES TO TERESI AND BADAMI IF MPR 136 APPLIED TO THOSE SALES.

(a) Teresi sale.

The District Court found that defendant sold a used Caterpillar "50" crawler tractor to Thomas D. Teresi on October 23, 1943, for the sum of $3,500.00 and that the maximum price at which the tractor could have been sold was $2,454.79. (Tr. p. 20.) The plaintiff's expert witness, Walter Shoemaker, testified that the base price of this tractor was $4,325.00. (Tr. p. 88.) Damages in the sum of $1,045.21 were awarded against defendant on this sale. (Tr. pp. 14-15.) If this machine was reconditioned and guaranteed under MPR 136 the ceiling price was 85% of the base price, $3,676.25, there was no overcharge and the award of these damages was erroneous.

The defendant's records of the sale to Teresi are in evidence as plaintiff's Exhibits 1-A to 1-H. Seller and purchaser signed a contract of sale containing the following guarantee:

> "with respect to the tractor (s) and equipment herein ordered, the distributor or dealer makes to the purchaser the same and no other warranty than the following, to-wit: 90 days Guarantee".

A copy of the contract and guarantee was given the purchaser. (Tr. p. 29.) The defendant followed a practice of orally guaranteeing all tractors selling for over $500.00 for 90 days. (Tr. p. 29.) Before making such guarantees defendant inspected and overhauled

the tractors in its shop. (Tr. p. 50.) The defendant's oral guarantees meant and were understood to mean that defendant obligated itself to maintain and keep the tractor in good working order for 90 days both as to defective parts and workmanship. (Tr. p. 48.) Defendant did not evidence its guarantees in writing as a rule. (Tr. p. 48.) Regardless of the writing or lack of writing evidencing its guarantees, defendant performed and made good on its representations. (Tr. pp. 49-50.)

The defendant, in fact, furnished the purchaser, Teresi, with $244.00 worth of free service to the tractor sold to him within the 90 day guarantee period following the sale. (Tr. pp. 28, 52.) The repair bills in evidence, plaintiff's Exhibits 1-A to 1-H, clearly show the character, time and amounts of these repairs.

The sale was guaranteed. It was also so invoiced. "Invoice" is defined in Webster's New International Dictionary as "a written account or itemized statement, of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the quantity, value or prices, and charges annexed".

The contract of sale to Teresi was itself the invoice. It likewise contained the written guarantee. The order should not be construed to require a seller to give the purchaser two pieces of paper when one will suffice. Plaintiff is seemingly contending that the defendant's sales tags should also show the fact of guarantee. The plaintiff's position might have some merit if the order required the seller to furnish the purchaser with a separate guarantee on the specified form prescribed

by the order such as is required by MPR 133. But MPR 136 only required that the guarantee be in writing. We submit that the delivery to the purchaser of a duplicate contract of sale containing the written guarantee and being itself the invoice entitled defendant to charge the guaranteed price provided in the order.

(b) Badami sale.

On September 13, 1943, defendant sold a used "A.G." Cletrac crawler tractor to T. J. Badami for the sum of $1,400.00 pursuant to a written contract of sale (Ptf's. Ex. No. 3) containing a guarantee as follows "2 mo. on faulty material." The Cletrac "A.G." model was a current machine with a base price of $1,745.00. (Tr. p. 88.) The District Court awarded damages in the sum of $440.25 against defendant, taking the sum of $959.75 as defendant's ceiling on the sale. If this machine was reconditioned and guaranteed under MPR 136 its ceiling price was $1,483.25, there was no overcharge and the award of damages on the sale is erroneous.

Defendant expended the sum of $50.23 in reconditioning this tractor for sale and no repairs were made or requested to be made during the guarantee period. (Tr. p. 52.)

As in all of the sales made by the defendant the purchaser received a duplicate of the sales contract, which contract was also the invoice. The judgment should be further reduced in the sum of $440.25, the damages awarded on this sale.

III.

THE ISSUANCE OF AN INJUNCTION WAS NOT PROPER UNDER THE FACTS IN THIS CASE.

Regardless of the applicability of MPR 136 to the sales of crawler tractors to farmers, the issuance of an injunction against defendant in this case was an abuse of discretion.

The issuance of an injunction under the Act is not mandatory, *Bowles v. The Hecht Co.,* 321 U.S. 321.

In *Bowles v. Arlington Furniture Co.,* 148 F. (2d) 467 (CCA 7th) it was held that an injunction against violations of MPR 136 under facts far less challenging to a sense of justice than those in the instant case was an abuse of discretion requiring reversal of the judgment.

CONCLUSION.

The judgment is erroneous insofar as it awards damages under MPR 136 on the sales to farmers and should be reduced by the sum of $3,600.11. If the Court determines that MPR 136 did apply to the sales of crawler tractors to farmers the judgment for damages is erroneous in the sum of $1,485.46, the damages awarded on the guaranteed sales to Teresi and Badami and should be reduced by that amount.

Dated, Palo Alto, California,
March 15, 1946.

Respectfully submitted,
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